Supreme Court, U.S.
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No. 99-302

IN THE

Supreme Court of the United States

GEORGE C. FIELDS; GARY E. CROWELL,

Petitioners,

v.

EUGENE F. ASSAF, SR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF CASE

In their Petition for a Writ of Certiorari, Petitioners make several misstatements. These misrepresentations are contained in paragraph 1 of page 4 of their Petition. Petitioners allege that Mr. Assaf "was generally responsible for directing his bureau so as to meet the transportation needs of the Commonwealth government while staying within his budget." This statement is misleading because Mr. Assaf had no idea of the income that his department generated or his department's budget (Assaf deposition, pg. 121). Moreover, Mr. Assaf had no input into his department's budget (Fields deposition, pg. 65).

Petitioners allege that Mr. Assaf "participated with the Deputy Secretary in establishing policies and procedures for obtaining and maintaining the Commonwealth's fleet of 8,000 vehicles." This claim is false. Mr. Assaf had no input into the number and type of vehicles purchased by the Commonwealth (Assaf deposition, pgs. 38-43). Purchasing decisions were made by the Commonwealth's Bureau of Purchasing (Fields deposition, pg. 16). With respect to maintenance of Commonwealth vehicles, Mr. Assaf merely followed manufacturer warranty suggestions (Assaf deposition, pgs. 35-37).

Petitioners also allege that Mr. Assaf could "approve outside repair shops and recommend rates for servicing and repairs." Again, the record does not bear out this assertion. Mr. Assaf did not negotiate with outside repair shops (Assaf deposition, pg. 41). Rather, labor rates were set by Mr. Assaf's superiors (Fields deposition, pg. 61). Each year this rate would increase based on a formula tied to inflation (Martin deposition, pgs. 23-24). Any repair shop willing to

perform work at the set rate or lower would automatically secure a contract with the Commonwealth (Heimbach deposition, pg. 10). This contract was drafted by Chief Counsel's Office, not Mr. Assaf (Fields deposition, pg. 66).

Finally, Mr. Assaf disagrees with the Petitioners statement of the question presented. Mr. Assaf believes that Petitioners have improperly suggested that the law on qualified immunity and political firing cases is unclear. Rather, the real question presented is whether the Third Circuit Court of Appeals properly applied the well-settled principles of qualified immunity when it found that Petitioners' actions lacked qualified immunity given the specific facts of the instant case.

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS CONSISTENT WITH OTHER UNITED STATES COURT OF APPEALS

Petitioners cite five cases which purportedly conflict with the Third Circuit. The Petitioners' reliance on *Conner v. McGraw*, 104 F.3d 358 (4th Cir. 1996) is irrelevant because it was an unpublished opinion thereby having no precedential value. The other four cases do not conflict with the Third Circuit's holding. All four cases espouse the same legal principles as the Third Circuit; they merely apply the law to the facts of the given case and reach conclusions favoring the government official rather than the victimized employee.

In *Guanaca v. State of Texas*, 65 F.3d 467, 468 (5th Cir. 1995), a county District Attorney allegedly fired an investigator for political reasons. The *Guanaca* court found qualified immunity because neither this Court nor the Fifth Circuit Court of Appeals had encountered a claim that was

the same as the specific position involved nor an analogous position as of the time of the firing. The *Guanaca* court found that the law need not be settled but no such cases had been decided as of the time of the firing such that an objectively reasonable governmental official would have known their actions were illegal. In the instant case, the Third Circuit applied the same standard. They merely found that Third Circuit precedent as of the time of Mr. Assaf's termination would have allowed reasonable government officials to know that they were acting unlawfully if they terminated Mr. Assaf under the circumstances of his employment.

Petitioners also invite this Court's attention to *Hall v. Tollet*, 128 F.3d 418, 421 (6th Cir. 1997). In that case, employees of the county's Sheriff's Department sued because of a political firing. As in the instant case, the Sixth Circuit applied the same standard as the Third Circuit. They considered whether a reasonable government official would have known their action to be illegal based on similar or analogous cases of this Court or the Sixth Circuit at the time of the firing. *Id.* at 429. Thus, no split in the Circuit arises from *Hall*.

Beauregard v. Olson, 84 F.3d 1402, 1403 (11th Cir. 1996) also fails to demonstrate a split in the Circuits. This case involved the patronage dismissal of a Deputy County Tax Collector. Based on a specific factual analysis of the position including Florida constitutional principles, the court found qualified immunity for the defendant. *Id.* at 1404. However, the standard applied in reaching this conclusion did not differ from the one applied by the Third Circuit in the instant case.

Finally, in *Billingsley v. St. Louis County*, 70 F.3d 61, 62 (8th Cir. 1995), a St. Louis County Council Administrative

Assistant brought suit over a political firing. The Eighth Circuit applied the same test as the Third Circuit, but merely found that a reasonable government official could believe that the termination was lawful. *Id.* at 63-64. Moreover, it is important to note that this Court gives consideration to cases that conflict "on the same important matter." (United States Supreme Court Rule 10) All cases cited by the Petitioners involve county officials. As such, the issues involved are not truly similar even if some conflict could be found (which Mr. Assaf vehemently disputes) since this case involves state governmental officials.

THE QUALIFIED IMMUNITY ISSUE IN THIS CASE HAS NO SPECIAL IMPORTANCE

In some cases, the standards for qualified immunity can be an important issue. However, this case presents a situation that really has no special importance. Not only does the Third Circuit's Opinion provide a predictable result, but Petitioners really attempt to secure review of this case because they do not like the result as opposed to not liking the rule.

In this case, the Third Circuit has merely followed the prior dictates of this Court. The Third Circuit's decision was nothing more than an application of *Anderson v. Creighton*, 483 U.S. 635 (1987) and its predecessor cases to the facts of the instant case. The court in no way extended or abrogated the holdings of this Court. Rather, Petitioners merely do not like the result of that application which is not a basis that merits this Court's review of the case.

THE THIRD CIRCUIT PROPERLY DECIDED THE CASE WITHIN THE SCOPE OF EXISTING LAW

Contrary to Petitioners' assertion, the Third Circuit's decision does not nullify the existence of qualified immunity. Rather, in a limited circumstance, the court found that two state officials were not entitled to qualified immunity based on the specific facts of the case. Petitioners imply that this decision will open government officials to hoards of litigation. This implication is clearly unwarranted.

The Third Circuit thoroughly addressed the considerations set forth by this Court in determining whether qualified immunity exists. Having done so, the Court then compared the facts of the instant case to a long line of Third Circuit precedent dating back for almost a decade before Mr. Assaf's termination. After a detailed analysis of the existing precedent, the Third Circuit reached the conclusion "that a reasonable official would not have concluded under clearly established law that political loyalty could be required for Assaf's position." The bottom line is that Petitioners simply disagree with the Third Circuit's well-reasoned Opinion, which merely applied this Court's prior precedent along with prior Third Circuit precedent. This disagreement should not serve as a basis for further review given the detailed, thorough, and scholarly analysis of the court below.

CONCLUSION

For all of the above reasons, the Court should deny Petitioners' Petition for a Writ of Certiorari. The case should be remanded to the trial court for the scheduling of a trial.

Respectfully submitted,

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